84-193

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JO-ANNE F. WOLFSON,

Petitioner

-vs-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

To The

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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(a)

QUESTIONS PRESENTED FOR REVIEW

1. Does a cross-examiner's question which is designed to mislead the jury, constitute per se obstruction to the administration of justice?

Otherwise stated, does the equating of impropriety with obstruction, effectively countermand this Court's restriction of contempt power to the punishment only of that misconduct which produces obstruction to the performance of judicial duty?

2. If any misimpression created by a cross-examiner's question can be removed by a short explanatory statement from the trial judge, may contempt punishment be used instead of such explanation? If so, is the contemnor entitled to any form of hearing?

3. Is there any objective standard whereby it may be determined whether a ques-

tion to a witness will mislead the jury?

More specifically, if a prosecution attempts to prove that a corrupt relationship existed between a public official and a criminal by proving that the criminal purchased merchandise from the official's private business, is the defense lawyer guilty of contempt for having misled the jury if she asks questions designed to emphasize the proposition that such sales are not inherently illegal?

4. As a matter of substantive due process, and within the federal system as a matter of supervisory policy, may the fact that a lawyer is engaged in the defense of a criminal case be considered as a factor indicative of bad faith or as aggravation of misconduct?

5. Where a trial judge participates actively in the evidence phase of a jury

trial, is a lawyer guilty of contempt in the following circumstances:

(a) If the judge provides for the jury the substantive answer to a question propounded to a witness, and the lawyer then pursues the same line of inquiry by questions directed to the witness?

(b) If the judge says "sustained" in the middle of the lawyer's question where no objection has been made, and the lawyer then completes the question?

(b)

LIST OF PARTIES

The contempt proceeding arose during a criminal trial involving ten defendants,* each represented by separate counsel. Those litigants, however, are not involved in this Petition, and have no interest herein.

*The defendants in the criminal proceeding, all former Chicago police officers, were Thomas Ambrose, James Ballauer, Frank Derango, John DeSimone, Robert Eatman, William Guide [Petitioner's client], William Haas, Curtis Lowery [Mr. Werksman's client], Joseph Pena and Dennis Smentek.

A discrete contempt proceeding arose during the same trial, and the appeal in that case was consolidated with Petitioner's appeal in the Seventh Circuit. Petitioner does not believe that the appellant in that case is a party to this proceeding, but offers the following identification.

Appellant:

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REFERENCE TO REPORTS

The judgment of the District Court is unreported. It is reproduced as Appendix C to this Petition.

The opinion of the Court of Appeals has not yet been published in an official reporter system. It is reproduced as Appendix A to this Petition.

(e)

STATEMENT OF JURISDICTIONAL GROUNDS

(i) The opinion of the Court of Appeals was issued on April 24, 1984.

(ii) A timely petition for rehearing was denied on May 29, 1984 (Appendix "B" to this Petition). No extension of time for filing this Petition has been sought or granted.

(iii) No cross-petition has been filed.

(iv) Jurisdiction to review the judgment by writ of certiorari is conferred by Title 28, U. S. C., § 1254(1).

(f)

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty or property without due process of law . . .

Title 18, U. S. C., § 401, provides in relevant part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as——
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule or command.

STATEMENT OF THE CASE

Petitioner was the lawyer for one of ten defendants jointly charged with violations of the Hobbs Act, RICO statute, and other federal crimes. The defendants were Chicago policemen who allegedly used their official authority to provide protection for a narcotics distribution syndicate.

The trial lasted for three months. Approaching the end of its case, the government presented evidence that certain narcotics offenders had purchased furniture and novelty clocks at a store operated as a part-time activity by several police officers one of whom was Petitioner's client William Guide. The government did not prove that the purchases had been made for prices disproportionate to the value of the merchandise, but apparently sought to suggest that the transactions were emblematic of an improper symbiotic relationship between

Guide and the criminals who traded at the store.

The alleged contempt occurred during Petitioner's cross-examination of an F.B.I. agent who had identified records relating to the purchases made at Guide's store by the narcotics offenders:

> Q (By Petitioner): Is it your experience as an FBI agent that it is a crime for somebody who is engaged in selling merchandise to sell to a person whose activities are illegal?
>
> THE COURT: Well, I think that calls for a legal conclusion.
>
> PETITIONER: Well, it is an FBI agent. It is a good person to ask.
>
> THE COURT: The answer to which is no.
>
> Q (By Petitioner): Do you know of any United States statute that you are sworn to enforce that makes it a crime——
>
> THE COURT: Sustained
>
> Q: ——for a commercial enterprise to sell to a crook?
>
> THE COURT: Ms. Wolfson, I sustained the very objection to that very question. I want to see counsel at side bar.
>
> (Discussion at side bar, in its totality as follows:)

> THE COURT: The court finds you in contempt, Ms. Wolfson, because of the last question, and the fine is $300. I will write up the necessary findings and order in due course.
>
> MR. BRADLEY [Counsel for one co-defendant]: Judge, can I ask——because I intend to cross-examine this witness——
>
> THE COURT: No, no. (Tr. 8886-87).

The subsequent written contempt order (Appendix C, pp. A-16) recited that Petitioner previously had asked questions on cross examination "which are not designed to illicit [sic] relevant facts . . . but rather to insinuate to the jury the existence of facts which . . . [Petitioner] is not prepared to prove by any other means." (App. A-17) The order also recited that Petitioner had repeated questions which had been held to be improper "[o]n more than one [prior] occasion". (App. A-17). The order does not make specific reference to any such event.

The order also states that the Court's

apparent answer to Petitioner's question—"The answer to which is no."——is "not entirely clear in cold print. But it could have left no doubt that the court was adhering to its ruling that the question was improper." (App A-19)

The contempt judgment was affirmed on appeal. Addressing Petitioner's contention that the incident had involved no obstruction to the administration of justice, the Seventh Circuit suggested that the requirement of obstruction as an element of contempt had resulted from judicial misinterpretation of Title 18, U. S. C., §401(1) (App. A-6, 7). Viewing this Court's decision in United States v. Wilson, 421 U.S. 309 (1975) as "altogether more hospitable to the contempt power" than was earlier precedent, the Court of Appeals assumed "for purposes of deciding the present case" that obstruction is a necessary element of contempt under §401(1) (App. A7).

The Court found obstruction, however, in that Petitioner was a defense lawyer in a criminal case. Since an unjustified acquittal cannot be appealed, the court reasoned, a defense lawyer who attempts to obtain an acquittal through improper cross examination "is violating the ground rules of the adversary struggle, and therefore obstructing the administration of justice." (App A-7) Petitioner also was held to have disobeyed a court order within the meaning of §401(3), by violating the district court's restriction on cross examination and by continuing to ask a question after "the judge's order——'sustained'——" had been articulated (App. A-8).

The Court of Appeals also held that summary procedure was justified because nothing significant would have been gained from giving Petitioner an opportunity to be heard, while the delay involved in giving Petitioner notice of charges and a chance to

respond would have provided an opportunity for further misconduct (App A-12). Conceding that "[i]n hindsight, we think it would have been a better course of action" to delay the trial for "a few minutes" to permit Petitioner to explain her actions and comment on the amount of the fine (App. A-13), the Court of Appeals held that no prejudice had resulted from the denial of that opportunity to be heard because "we think it inconceivable that [the trial judge] would have come to a different conclusion" if Petitioner had been permitted to be heard (App. A-14).

In essence, the Court of Appeals held that Petitioner's question to the F.B.I. agent had been actionable contempt because it had been used "as a vehicle for misleading the jury . . . into thinking . . . that the fact that police officers sell merchandise to known drug dealers is irrelevant to

a charge that the officers are involved in a protection racket" (App A-8).

Two weeks prior to Petitioner's contempt adjudication, another defense lawyer in the same case, Gerald M. Werksman, had been convicted of contempt for asking questions designed to show that his client had failed to arrest drug dealers because of his awareness that he had searched them without probable cause, and because in some cases the searches had yielded no contraband. Werksman's appeal was consolidated with that of Petitioner. The opinion below also affirms Werksman's conviction, on the premise that his questions had been used "as a vehicle for misleading the jury . . . into thinking that drug dealers cannot be arrested unless they are found with illegal drugs actually on their person" (App A-8).

BASIS FOR FEDERAL JURISDICTION

The alleged contempt occurred during a trial conducted in a United States District Court, based upon an indictment returned by a federal grand jury alleging violations of various sections of Title 18, United States Code.

REASONS FOR ALLOWANCE OF THE WRIT

1.

The Confused State of the Law of Contempt

It is doubtful that any area of the law is less predictable in its application than contempt of court. That state of uncertainty is all the more surprising, given the lengthy history of the contempt remedy and the frequency with which reviewing courts have addressed the issues. It may be reasonable to hazard the conjecture that the blurring results from the special vulnerability of contempt proceedings to *ad hoc* resolutions which reflect the personal philosophies of the litigant-arbiter.

As aptly stated by one commentator,

> [T]he line between zealous advocacy and contemptuous conduct is often narrow and ill-defined. An analysis of the case law indicates that the state and federal district courts are largely responsible for the lack of precision and uniformity in contempt law. The reported opinions tend to be result oriented

> with little or no attempt made to reconcile past decisions with present ones." R. Anderson, A Pragmatic Look At Criminal Contempt and the Trial Attorney, 12 Baltimore L. Rev. 100, 107 (1982).

The unsettled state of the Constitutional principles involved in contempt proceedings, has attracted widespread comment in recent years. See, e.g., Martineau, Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt, 50 Cincinnati L. Rev. 677 (1981); Comment, The Role Of Due Process in Summary Contempt Proceedings, 68 Iowa L. Rev. 177 (1982); Comment, Criminal Contempt in Maine: Constitutionally Protected or Neglected?, 34 Maine L. Rev. 407 (1982); Comment, Contempt of Court: Wisconsin's Erasure of the Blurred Distinction Between Civil and Criminal Contempt, 66 Marquette L. Rev. 369 (1983).

The decision below is illustrative of that unpredictability. In an earlier case, the Seventh Circuit reversed the contempt

conviction of a lawyer who, while defending a draft-evasion prosecution, convulsed the courtroom spectators by showing his client a photograph of the induction station and inquiring about a non-existent sign which, in the lawyer's "imagination", contained the legend "Abandon Ye All Hope Who Enter Here." Although the offending remark caused the spectators to break into laughter, applause, and shouts, the contempt conviction was reversed for want of "an actual and material disruption or obstruction of the administration of justice." (Court's emphasis in original.) United States ex rel Robson v. Oliver, 470 F. 2d 10, 12 (1972). A very similar result was reached by the same court on other occasions. See, e.g., In re Dellinger, 461 F. 2d 389, 397 (1972), emphasizing that any charge of lawyer contempt must be evaluated "with full appreciation of the contentious role of trial counsel and his duty of zealous representation of his cli-

ent's interests."

The opinion here presented for review cannot possibly be squared with Oliver or with Dellinger. Yet, it makes no reference to those earlier and completely antithetical authorities. That incongruity can only contribute to the impression that the question whether any given irregularity will be deemed criminal contempt, is dependent upon the identity of the individual empowered to make the decision rather than upon a principled rule of law.

As noted by Justices Blackmun and Rehnquist, disparities in the application of contempt law are not unknown even at the ultimate level of authoritative pronouncement. United States v. Wilson, 421 U.S. 309, 318 (Justice Blackmun, dissenting).

The decision in Wilson, viewed by the court below as "altogether more hospitable to the contempt power" than earlier precedent, also has been treated in the

State courts as signalling a softening of the Constitutional barriers against enlargement of the summary contempt remedy. See Naunchek v. Naunchek, 463 A. 2d 603, 606, 191 Conn. 110 (1983).

The presumptively enlarged boundaries have not been delineated. Uncertainty is multiplied by the possible impact of changes in the composition of the Court subsequent to Justice Rehnquist's dissent, joined by the Chief Justice, in Codispoti v. Pennsylvania, 418 U.S. 506, 523. Justice Blackmun's dissent in Wilson, supra, 421 U.S. at 320, deals in part with the impact of a similar change.

No greater service could be rendered to the administration of justice, and no more welcome benefit could be conferred upon those involved in the process, than a clear and authoritative formulation of the principles applicable to the punishment of trial irregularities as contempt of court.

2.

Obstruction As An Element Of Contempt

This Court has never deviated from the principle that "obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest." Ex Parte Hudgings, 249 U.S. 378 (1919). In re McConnell, 370 U.S. 230, 234-236, emphasized that principle by stating that any obstruction must be actual, rather than abstract or imagined, and must be clearly shown on the record. Actionable obstruction "must be clearly shown", Hudgings, supra at 383. It must cause "immediate interruption" of the court's business, In re Michael, 326 U.S. 224, 227 (1945). Nye v. United States, 313 U.S. 33, 52 (1941) suggests "long delay and large expense" as the type of obstruction punishable by contempt.

The opinion below accepts those prin-

ciples grudgingly, while arguing that they result from a mistaken interpretation of the Statute (App. A-6, 7). It then purports to apply those principles to the case at bar, but does so in a novel manner by stating that any "deliberate" overstepping of "the proper bounds of cross-examination" is, at least if done by a lawyer defending a criminal case, a violation of "the ground rules of adversary struggle, and therefore [an] obstruct[ion of the] admnistration of justice." (App. A-7)

To say, however, as does the opinion below, that misconduct is tantamount to obstruction---that it is, indeed, obstruction per se---is effectively to circumvent the requirement that obstruction be shown. The definition of obstruction adopted below, reasonably may be analogized to an irrebuttable presumption. Whatever may be the practical utility of such presumptions, their very nature precludes their being

described as elements discrete from the predicate facts upon which they are based.

The opinion below annuls a monolithic limitation on the exercise of the contempt power, proceeding larely from the premise that this Court's opinions, so far as inconsistent with the result below, are mistaken. It renders a showing of obstruction unnecessary, by simply inferring obstruction from a showing of impropriety. It is a drastic change in the law of contempt, in disguised defiance of this Court's pronouncements.

If the trial judge had been concerned that the jury might have been misled by Petitioner's suggestion, the situation could have been remedied competely by a simple statement to the effect that although the sales were not inherently illegal, the jury was free to consider those transactions as bearing upon the nature of the relationship between the defendant and the narcotics offenders.

If the trial judge resented Petitioner's completion of the question after he said "Sustained", he need only have stricken the question, possibly even coupling that action with a reprimand which would have deprived Petitioner of any tactical advantage from the jury's perspective.

A contempt proceeding simply was not necessary to vindicate any legitimate judicial objective. The trial court's action cannot be squared with the long-established principle that federal contempt power is limited to "the least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. 204, 231, 5 L. Ed. 242 (1821). That pronouncement has withstood the test of time. Harris v. United States, 382 U.S. 162, 165 (1965).

The Court of Appeals justifies the use of contempt as a means of avoiding future misconduct. (App. A-9 through 12) There was, however, no showing of a protracted course

of misconduct on Petitioner's part such as to justify resort to contempt process.

In pronouncing judgment, the trial court relied entirely upon the single question cited in the opinion. The written contempt order, prepared five days later, states that "[o]n a number of occasions" during the preceding nine weeks, (later restated as "more than one occasion,") the court had admonished petitioner for asking improper questions. (App. A-17) There is, however, no reference to any specific occasion upon which Petitioner was guilty of any type of impropriety prior to the event upon which the contempt citation was based.

The event occurred during the ninth week of a complex trial involving ten defendants, eleven defense lawyers and a multiple-count indictment. In any such trial, it is possible that a subsequent review of the transcript will produce several instances of arguable misconduct on the part of even

the most circumspect of advocates. Perhaps that could have been done in this case, as in any other. However, it was not done. To rest a contempt citation on generalities, is to render the profession of advocacy unduly hazardous.

3.

"Confusing the Jury" As Contempt

The ultimate thrust of the opinion below is that Petitioner's contempt consisted in using cross-examination "as a vehicle for misleading the jury . . . into thinking . . . that the fact that police officers sell merchandise to known drug dealers is irrelevant to a charge that the officers are involved in a protection racket" (App. A-8).

If, however, Petitioner's question is held contemptuous on that ground, then it would have been no less contemptuous for Petitioner to have argued to the jury during

her summation that the sales transactions were not inherently illegal. That bizarre result points up dramatically the danger of holding a defense lawyer in contempt for attempting to induce the jury to draw from the evidence a conclusion which the judge deems unwarranted. As the result in this case demonstrates graphically, the term "mislead the jury" can quickly become confused with legitimate suggestions favoring acquittal of criminal defendants.

Moreover, although it would have been completely proper for Petitioner to have argued that the purchases were "irrelevant" to the issues, the simple fact is that she did not do so. She suggested only that the sales were not inherently illegal. No contrary contention was made by the government.

Whatever is meant by "confusing the jury", it certainly must mean something different from urging their adoption of an inference other than that drawn by the court.

Petitioner had an affirmative duty to urge that the sales were not improper. To characterize her adoption of that position as criminal contempt because it misled the jury, is to establish an intolerably dangerous precedent whose chilling effect on the right to advocacy is beyond measure.

4.

The Essentials of Due Process

Petitioner was held in contempt in as summary and cryptic a fashion as can be imagined. The Court of Appeals justifies that procedure on a cost-benefit analysis, concluding that nothing was lost because it was "inconceivable that [the trial judge] would have come to a different conclusion" if a hearing had been held (App. A-14).

That suggestion is less than flattering to the trial judge, and denigrates the very concept of due process. If a hearing had been held, we think it very possible

that he trial judge might have agreed that his statement, "The answer . . . is no", did not necessarily mean that an unspoken objection to the question had been sustained. He might have been persuaded that his subsequent ruling, "Sustained", had not been made while eight words of the question were yet to be spoken, and indeed had not even been heard before the question ended. (After all, the contempt finding was based upon a highly equivocal previous ruling.) He might have been persuaded that Petitioner had not improperly misled the jury, or that lesser corrective action than contempt would be appropriate.

We will never know. That is the price of dispensing with due process.

Respectfully submitted,

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APPENDIX "A"
OPINION OF THE COURT OF APPEALS

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1777
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CURTIS LOWERY,

Defendant.

APPEAL OF: GERALD M. WERKSMAN.

No. 82-1860
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM GUIDE,

Defendant.

APPEAL OF: JO-ANNE F. WOLFSON.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 664—**John F. Grady**, *Judge.*

ARGUED FEBRUARY 8, 1984—DECIDED APRIL 24, 1984

Before WOOD and POSNER, *Circuit Judges*, and REYNOLDS, *Chief District Judge.**

POSNER, *Circuit Judge.* Gerald Werksman and Jo-Anne Wolfson, each of whom represented one of the defendants in a protracted criminal trial of 10 Chicago policemen accused of having protected drug dealers in the Marquette district of Chicago, appeal from judgments of criminal contempt summarily meted out to them during the trial by the district judge for alleged misconduct in cross-examining witnesses. The judge fined Werksman $500 for his contempt, and Wolfson $300 for hers. We are asked to decide whether the two lawyers' conduct was contemptuous within the meaning of 18 U.S.C. § 401 and if so whether the summary contempt procedure employed by the judge under the authority of Rule 42(a) of the Federal Rules of Criminal Procedure was appropriate to deal with that conduct.

A witness for the prosecution testified that one Goose had been selling heroin at a street corner, from his hand, when Lowery (Werksman's client) "jumped up from behind a picket fence and grabbed him." To the question, "What happened then?," the witness replied, "They kidded around and laughed," and that Goose had not been arrested. On cross-examination Werksman told the witness, "I don't want to ask you about the law of arrest or the law of search or seizure, but I want to ask you whether Officer Lowery, to your knowledge, knew what Goose had in his hand until he jumped up from behind the picket fence and grabbed him." Werksman was trying to show that Lowery had not had probable cause to arrest Goose when he grabbed him. That would have made the grabbing an unlawful arrest, in which event the fruit of it—the heroin in Goose's hand—could not have been used in evidence against Goose, Goose could not have been convicted, and Lowery therefore would not have been pro-

* Hon. John W. Reynolds of the Eastern District of Wisconsin, sitting by designation.

tecting Goose by failing to arrest him. The witness replied that it had been "quite obvious" what Goose had in his hand. After persisting unsuccessfully in this inquiry for a few more questions, Werksman asked, "Have you ever had any courses on arrest or search and seizure?" Before the witness could answer, the judge interposed, "That question is stricken." Werksman had no more questions and the witness was excused. The judge then summoned Werksman to the bench, where out of the hearing of the jury he told him: "Mr. Werksman, your last question, taken together with the disclaimer, so-called [a reference to Werksman's having said 'I don't want to ask you about the law of arrest or the law of search and seizure'], expressed in a question or two prior to that, will cost you $500, payable to the clerk of the court by the close of business on the following day."

The judge issued an opinion the next day, explaining in detail the basis for the order. He pointed out that, "Early in the case, various defense counsel began an effort to insinuate to the jury that, unless a person had actual physical possession of the narcotics, he could neither be validly arrested nor convicted. The attempt was made by asking the drug peddler witnesses, on cross-examination, questions like 'You knew, didn't you, that if you did not have the narcotics on your person you couldn't be arrested or convicted?' " These questions were improper, both because they asked for legal conclusions and because they falsely implied that having drugs on one's person is a prerequisite to arrest and conviction for a drug offense. Objections to such questions were made and consistently sustained but the lawyers kept asking them, even after the judge ordered the lawyers to stop. It was against this background that Werksman had committed the contempt for which the judge had punished him. By disclaiming any intention of asking the witness about the law of search and seizure, and then a few questions later asking him whether he had ever taken any courses in that law, Werksman insinuated to the jury that a drug dealer could not be arrested unless the arresting officer knew beforehand

that the dealer had narcotics on his person. The court explained: "The offending questions asked by Mr. Werksman were actually statements by him," made "in deliberate, calculated disregard of the court's repeated rulings and admonitions. The statements were made in a loud and sarcastic tone of voice, apparently intended to convey to the jury his open defiance of the court's rulings and his invitation to the jurors to be guided by his view of the law rather than the law as announced by the court." The court found that "no measure short of a contempt citation and imposition of a sanction will be effective to deter the contemptuous conduct of Mr. Werksman. Repeated warnings and admonitions were of no avail." With regard to the need for proceeding summarily, the judge explained that "unless it [i.e., the court] does deter the misconduct of Mr. Werksman, the trial of this long and difficult case, which is in its sixth week and is expected to last at least another month, will become unmanageable, since Mr. Werksman can be expected to continue in his defiance as long as no sanctions are imposed." The judge refused to stay the payment of the fine pending appeal: "Delay of payment would dilute the effect of the punishment, and the full effect is urgently needed at this time." The judge added that in his six years on the bench he had never before found it necessary to hold a lawyer in contempt for conduct in the courtroom.

The incident concerning lawyer Wolfson occurred two weeks later. Again the contempt was adjudged in a sidebar conference without elaboration of the grounds for the contempt, and the judge issued a formal order a few days later explaining that he had warned Wolfson several times about asking questions on cross-examination designed to insinuate to the jury the existence of facts not within the witness's knowledge. The background to the contempt was as follows. Several of the defendants, including Wolfson's client, owned, on the side, a "clock shop" that sold clocks and other merchandise. There was evidence that the drug dealers whom the defendants were accused of protecting made frequent purchases from the shop at grossly inflated

prices that could only be bribes for the protection that the policemen were providing to these dealers. During Wolfson's cross-examination of an FBI agent who on direct examination had identified certain photographs and sales records relating to the clock shop's sales to drug dealers, the following exchange took place:

BY MS. WOLFSON:

Q Is it your experience as an FBI agent that it is a crime for somebody who is engaged in selling merchandise to sell to a person whose activities are illegal?

THE COURT: Well, I think that calls for a legal conclusion.

MS. WOLFSON: Well, it is an FBI agent. It is a good person to ask.

THE COURT: The answer to which is no.

BY MS. WOLFSON:

Q Do you know of any United States statute that you are sworn to enforce that makes it a crime—

THE COURT: Sustained.

BY MS. WOLFSON:

Q —for a commercial enterprise to sell to a crook?

THE COURT: Ms. Wolfson, I sustained the very objection to that very question.

I want to see counsel at the side bar.

The judge then held her in contempt. In his written order he explained that "The contemptuous conduct of Ms. Wolfson consisted of asking an obviously improper question, arguing impertinently with the ruling of the court and then proceeding to ask the same question again in defiance of another ruling of the court." The questions she asked of the FBI agent were not intended to elicit facts; they were purely rhetorical; she was trying to use the witness as her mouthpiece to impress on the jury that the defendants were not guilty of a crime in selling mer-

chandise to drug dealers. This was "intentional and willful. It was a repetition of the same kind of conduct about which the court had repeatedly admonished her. It is clear to the court that unless disciplinary action is taken against Ms. Wolfson, she will continue to defy the rulings of the court."

There is no doubt that the two contempt judgments were criminal; and they were proper therefore only if they were authorized by section 401 of the Criminal Code. Section 401(1) authorizes punishment for contempt consisting of "Misbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice . . . ." Section 401(3) authorizes punishment for contempt consisting of "Disobedience or resistance to [the court's] lawful writ, process, order, rule, decree, or command." The government argues that the contempt judgments can be upheld under either section; the judge did not indicate under which section (or sections) he was proceeding.

The appellants argue that the only misbehavior in the presence of the court that can be punished as contempt is misbehavior that actually obstructs the administration of justice. But, at least linguistically, the reference in the statute to obstructing the administration of justice qualifies only the liability of one who commits a contempt outside of the presence of the court though "so near thereto as to obstruct the administration of justice"; "so" goes with "as." Read to allow the court to punish "misbehavior of any person in its presence . . . as to obstruct the administration of justice," the statute is hopelessly ungrammatical.

There would be no ambiguity if the draftsmen had placed a comma after "presence" and before "or so near thereto . . . ." But, as a matter of fact, the original statute did have a comma there, Act of March 3, 1911, ch. 231, § 268, 36 Stat. 1163, 28 U.S.C. § 385 (1940 ed.), as did the judicial formulation from which the statute seems to have been derived. See *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. 972, 975 (C.C.D. Ind. 1896)

(". . . committed within the presence of the court, while sitting judicially, or so near to the court as to interfere with or interrupt its orderly course of procedure . . ."). The comma was dropped when the contempt provision of section 385 was moved to Title 18 and codified as 18 U.S.C. § 401, but the Reviser's Note makes clear that no substantive change was intended.

A reading that confines the requirement of proving an obstruction of the administration of justice to contempts committed outside of the judge's presence has more than history and grammar to commend it. As federal judges do not enjoy a roving commission to punish as contempts misbehavior occurring anywhere, the words "so near thereto as to obstruct the administration of justice" place appropriate limits on what would otherwise be a quite remarkable power; these limits are less necessary where the misbehavior occurs in the judge's presence.

Nevertheless, the Supreme Court, in *In re McConnell*, 370 U.S. 230, 234 (1962), assumed that section 401(1) requires proof of an obstruction of the administration of justice even where the contempt occurs in the court's presence; and *United States ex rel. Robson v. Oliver*, 470 F.2d 10, 12 (7th Cir. 1972), in this circuit, so holds. See also *In re Kirk*, 641 F.2d 684, 687 (9th Cir. 1981); *Gordon v. United States*, 592 F.2d 1215, 1217 (1st Cir. 1979). A more recent Supreme Court decision, *United States v. Wilson*, 421 U.S. 309, 315 (1975), though altogether more hospitable to the contempt power than *McConnell*, also implies that conduct in the presence of the court must constitute an obstruction in order to be actionable as a contempt under section 401(1). And so we shall assume for purposes of deciding the present case, merely noting in passing that none of the courts that have discussed the question have considered the grammatical and historical considerations that indicate that the requirement of showing an obstruction of the administration of justice was not intended to apply when the contempt was committed in the court's presence.

But our assumption does not carry the day for the appellants. If a defense lawyer, knowing as he must that a judgment of acquittal cannot be set aside no matter how egregiously the jury disregarded the law or the facts and that a judge will be reluctant to declare a mistrial toward the end of a protracted criminal trial, deliberately exceeds the proper bounds of cross-examination in an effort to obtain his client's acquittal, he is violating the ground rules of the adversary struggle, and therefore obstructing the administration of justice. The only question therefore is whether the lines of questioning that the appellants were pursuing exceeded—so clearly that it could be inferred that they were acting willfully and therefore contemptuously—the proper bounds of cross-examination, and we think the answer is yes. To ask a witness for legal conclusions, and to do so as a vehicle for misleading the jury—whether into thinking that drug dealers cannot be arrested unless they are found with illegal drugs actually on their person (Werksman), or that the fact that police officers sell merchandise to known drug dealers is irrelevant to a charge that the officers are involved in a protection racket (Wolfson)—exceeds those bounds by a wide margin.

The appellants also violated section 401(3), because they disobeyed the district court's lawful orders regarding the permissible scope of cross-examination. See *In re Gustafson*, 650 F.2d 1017, 1020 (9th Cir. 1981) (en banc). In Wolfson's case it was also disobedience of the judge's order sustaining an objection to the very question that she went ahead and completed after the objection was sustained. (True, no objection had been made, but the judge's order—"sustained"—was all the more emphatic on that account.) The appellants argue that the judge should not have fenced in their cross-examination so tightly. That is irrelevant. An order, to be lawful, need not be correct. The proper remedy for error in trial rulings is appeal rather than defiance, *Sacher v. United States*, 343 U.S. 1, 9 (1952); *Commonwealth of Pennsylvania v. Local Union 542*, 552 F.2d 498, 505-06 (3d Cir. 1977), unless the

practical consequences of the order that is defied cannot be corrected by an appeal, *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1157-58 (7th Cir. 1984) (en banc), which is not the case here: an error in curtailing cross-examination is reviewable by this court on appeal from the final judgment. The appellants point out that such an error might be deemed harmless by the appellate court. But if it is harmless, their clients have no reason to complain about it. The appellants' real concern is that the error might be harmful yet the appellate court might erroneously rule that it was harmless. This is possible, of course; but to use this possibility as the basis for excusing the appellants' misconduct is to make the fallibility of the appellate process a ground for defiant behavior in the trial court. A lawyer could never be held in contempt for disobeying a trial judge's order.

We are not much impressed by the appellants' talk about their obligation to their clients and about what they choose, unfortunately as it seems to us, to describe as the district court's "judicial paranoia" in being concerned that the appellants' "simple questioning" (as they call it) might impair the functioning of the district court. The obligation of counsel is to defend his client within the rules of the game; he has neither duty nor right to break the rules. The appellants thus go too far in stating in their brief, without qualification, that "defense lawyers must not be restricted in the pursuit of their client's causes." Nor is it paranoid for courts to be concerned that improper questioning can give a party—either party—an unfair advantage in litigation. What is true is that, since our adversary system encourages vigorous advocacy to the point where lawyers sometimes forget themselves in the heat of combat, trial judges are not allowed to use the contempt power to ensure an atmosphere of decorous understatement. Disrespectful conduct is not contemptuous. *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972). In *McConnell*, the Supreme Court reversed the contempt conviction of a lawyer who had said to the trial judge, after the judge had ruled that the lawyer could not ask

a particular line of questions, "we have a right to ask the questions, and we propose to do so unless some bailiff stops us." 370 U.S. at 235. This was insubordinate; but since, despite his bold words, the lawyer did not attempt to pursue the forbidden line of questions, the Supreme Court held that he was not guilty of contempt. In this case the judge found the lawyers guilty of contempt only after repeatedly warning them not to ask the questions that he punished them for asking when they persisted.

We turn to the question whether summary procedure was proper. Rule 42(a) of the Federal Rules of Criminal Procedure provides that "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." These conditions are satisfied here, and there is nothing on the face of Rule 42(a) (or of Rule 42(b), which provides that "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice," and goes on to set forth detailed procedural requirements that were not followed here) that suggests any limitation on the use of summary procedure in any case within the scope of Rule 42(a). The Supreme Court, however, has said that Rule 42(a) should be used sparingly; and from the Court's by no means unwavering pronouncements on the subject (compare *Wilson*, *supra*, with *McConnell*, *supra*) this court has distilled the rule that a contempt may be punished under Rule 42(a)—even if all of the conditions stated in the rule are fulfilled—only if in addition "there is a 'compelling reason for an immediate remedy' or time is of the essence." *United States v. Moschiano*, 695 F.2d 236, 251 (7th Cir. 1982).

This rule can best be understood as an application of the general formula of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining how many procedural safeguards are required in particular classes of case to satisfy the requirements of due process. Applied to a summary proceeding the formula requires a comparison of the

benefits of a fuller proceeding in avoiding errors (benefits that are a function of the magnitude as well as probability of the errors that would be avoided) with the costs of that procedure. As there is no statutory limit to the size of the fine that can be imposed for a contempt under Rule 42(a)—though appellate courts can cut down a contempt sanction that is unreasonable in relation to the contempt, *United States v. Martinez*, 686 F.2d 334, 341-42 (5th Cir. 1982)—there is no reason to think that this formula will yield the same conclusion in every case where a contempt is committed in the presence of the court. The appellants were fined $500 and $300 respectively, which is close to the bottom of the severity range. (It is true that any sanction for contempt could open a lawyer to disciplinary proceedings that might result in much heavier sanctions. But the smaller the fine, the less likely such collateral sanctions are; and the appellants express no concern that such sanctions might be imposed.) And not only were the fines small, but the likelihood that they were imposed erroneously (and that the errors would have been caught in a fuller Rule 42(b) proceeding) was slight. Unlike a case where the alleged contempt consists of throwing an ink well at the bailiff, here the entire conduct constituting the alleged contempt was recorded in a court reporter's stenographic transcript the accuracy of which is not questioned. It is hard to see what kind of evidentiary hearing could profitably have been conducted. The only two questions we can think of that might have been gone into at such a hearing were whether Werksman spoke in a loud and sarcastic tone of voice and whether Wolfson heard the judge say "sustained" while she was in the middle of her question. We do not believe that the findings of contempt or the sanctions imposed would have been different if these rather peripheral issues had been subjected to full adversary examination before another judge.

Although the benefits of a fuller proceeding would not have been great, the costs might well have been. The judge was concerned that if the lawyers persisted in their

improper questioning they would wreck a long trial involving grave charges of public corruption. The lawyers had given no indication that they would obey the judge's rulings. They might have been more impressed if the judge had issued the notice that is required for a contempt proceeding under Rule 42(b), but there were risks in following that procedure, too. During the period in which a Rule 42(b) proceeding was wending its way to a hearing (which might have had to be before a different judge because of the penultimate sentence of Rule 42(b)), Werksman and Wolfson might have persisted in their improper questioning to the point where a mistrial would have had to be declared—after more than a month of trial of ten defendants. The case is thus unlike *Moschiano*, where the judge did not adjudge the contempt until after the trial was over, which showed there was no need for haste. There was such a need here—or so it reasonably appeared to the judge; and *Moschiano* holds that "when the court makes an explicit determination that there was a compelling need for an immediate remedy, we shall give appropriate deference to that finding, which is one the trial court is particularly qualified to make in the first instance." 695 F.2d at 252. The district judge had the feel of the trial and a much better sense of these lawyers' pertinacity than we can get from the cold transcript. See *In re Gustafson*, *supra*, 650 F.2d at 1018-23, where summary contempt was held proper on rather similar facts.

Of course the fact that Rule 42(a) authorizes summary procedure does not mean that the judge must or should dispense with *all* procedure. Dissenting in *United States v. Galante*, 298 F.2d 72, 76-79 (2d Cir. 1962), Judge Friendly argued that to hold a person in contempt without giving him an opportunity to be heard, however briefly, before sentence was imposed was so grave a violation of due process as to require reversing the contempt conviction, even though the appellant had not raised the issue either in the trial or the appellate court. That was a dissenting opinion; but a later decision (albeit in a different circuit) holds that, before summarily holding a person in

contempt, the trial judge should both warn the person of the consequences of his persisting in the allegedly contemptuous conduct and give him an opportunity to be heard on the question. *United States v. Brannon*, 546 F.2d 1242, 1249 (5th Cir. 1977); see also the American Bar Association's Standards for Criminal Justice at p. 6-53 (2d ed. 1980); 3 Wright, Federal Practice and Procedure: Crim. 2d § 708 at p. 846 (1982). However, the Supreme Court in *Taylor v. Hayes*, 418 U.S. 488 (1974), while indicating that this was indeed the better procedure, see *id.* at 498-99 and n. 8, also indicated that a trial judge may, "for the purpose of maintaining order in the courtroom, . . . punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him." *Id.* at 497. For this proposition the Court cited *Ex parte Terry*, 128 U.S. 289 (1888), which explicitly so holds. See *id.* at 307-10. And *United States v. Wilson*, *supra*, 421 U.S. at 316, also cites *Ex parte Terry* with apparent approval.

The judge could have adjourned the trial briefly while he gave Werksman and Wolfson a chance to explain themselves before he held them in contempt and to comment on the appropriate size of fine before he sentenced them. In hindsight we think that would have been a better course of action; it would not have delayed the trial for more than a few minutes or encouraged the appellants in their contumacious conduct, yet it would have given them the rudiments of notice and opportunity to be heard, which are the fundamental elements of due process of law. But in the circumstances of this case, even if we thought *Ex parte Terry* had been overruled we would not hold that the procedure followed by the district judge was reversible error. He had on several occasions warned the lawyers that he would not allow them to pursue the lines of questioning that he later held to be contemptuous. And on one of these occasions he allowed them to explain at length why they thought the questioning was proper. They thus were on notice that if they persisted they would be disobeying the judge's orders, an explicit ground

for a contempt finding, see 18 U.S.C. § 401(3), and they had an opportunity to explain why they thought they should be allowed to ask the questions nevertheless. And in light of the district judge's very full and convincing explanation of his actions in the written orders that he issued shortly after adjudging the appellants in contempt, we think it inconceivable that he would have come to a different conclusion if he had given them additional notice or held a brief hearing before holding them in contempt; and as the fines he imposed were small it is also unlikely that the appellants could have persuaded him to make them still smaller. Because the additional procedure would have made no difference to the outcome, we do not think its omission, even if erroneous (which the continued authority of *Ex parte Terry* makes us doubt), requires reversal.

The judgments of contempt are

AFFIRMED.

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APPENDIX "B"

COURT OF APPEALS ORDER DENYING REHEARING

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 29, 1984

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN W. REYNOLDS, Chief District Judge*

No. 82-1777
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CURTIS LOWERY,
Defendant.
APPEAL OF: GERALD M. WERKSMAN.

No. 82-1860
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM GUIDE,
Defendant.
APPEAL OF: JO-ANNE F. WOLFSON.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 664
John F. Grady, Judge.

On May 8, 1984, defendants Gerald R. Werksman and Jo-Anne F. Wolfson filed petitions for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition; none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petitions are therefore DENIED.

*Hon. John W. Reynolds of the Eastern District of Wisconsin sitting by designation.

APPENDIX "C"
TRIAL COURT CONTEMPT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 81 CR 664
	)	
THOMAS AMBROSE, et al.,	)	
	)	
	)	
Defendants.	)	

CONTEMPT ORDER

Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 401, the court finds that Attorney Jo-Anne F. Wolfson is guilty of a criminal contempt of court which was seen and heard by the court and was committed in the actual presence of the court on May 28, 1982. The facts and circumstances leading up to the contempt, and the specifics of the contempt itself, are as set out below.

Background

The indictment in this case charges ten Chicago policemen with various federal offenses arising out of their alleged complicity with various heroin sellers in the Tenth Police District. The government's evidence has tended to show that each of the ten defendants accepted money and other things of value from the heroin peddlers in exchange for allowing the heroin traffic to continue.

The government has introduced various kinds of evidence tending to show that defendants exhibited a tolerant and even friendly attitude toward the heroin peddlers. One such item of evidence is that a clock shop, owned by several police officers, including the defendant William Guide, sold numerous clocks and several custom made items of furniture to various notorious drug peddlers.

Attorney Jo-Anne Wolfson represents the defendant William Guide. On a number of occasions throughout this trial, now in its ninth week, the court has found it necessary to admonish Ms. Wolfson for asking questions on cross-examination which are not designed to illicit relevant facts within the knowledge of the witness but rather to insinuate to the jury the existence of facts which are not within the knowledge of the witness and which Ms. Wolfson is not prepared to prove by any other means. On a number of such occasions, the court has had to strike Ms. Wolfson's questions and instruct the jury to disregard them. In several instances, Ms. Wolfson asked essentially the same question a second time immediately after an objection had been sustained or the question had been stricken. On more than one such occasion prior to May 28, 1982, she was admonished by the court to refrain from repeating questions which had been held improper.

The Contempt

On May 28, 1982, the government called FBI Agent William Kunzelman as a witness. On direct examination, he identified photographs of clocks and other merchandise allegedly purchased by certain heroin dealers from the

defendant Guide's clock shop. Kunzelman also identified various sales records of the clock shop as pertaining to the items shown in the photographs. On cross-examination by Ms. Wolfson, the following occurred (p. 8886 of the transcript):

BY MS. WOLFSON:

Q Is it your experience as an FBI agent that it is a crime for somebody who is engaged in selling merchandise to sell to a person whose activities are illegal?

THE COURT: Well, I think that calls for a legal conclusion.

MS. WOLFSON: Well, it is an FBI agent. It is a good person to ask.

THE COURT: The answer to which is no.

BY MS. WOLFSON:

Q Do you know of any United States statute that you are sworn to enforce that makes it a crime —

THE COURT: Sustained.

BY MS. WOLFSON:

Q — for a commercial enterprise to sell to a crook?

THE COURT: Ms. Wolfson, I sustained the very objection to that very question.

I want to see counsel at the side bar.

Thereupon, at a sidebar conference out of the hearing of the jury, the court held Attorney Wolfson in contempt and imposed a fine of $300.00. (Tr. p. 8887).

The contemptuous conduct of Ms. Wolfson consisted of asking an obviously improper question, arguing impertinently with the ruling of the court and then proceeding to ask the same question again in defiance of another ruling of the court. Specifically, the question

> Is it your experience as an FBI agent that it is a crime for somebody who is engaged in selling merchandise to sell to a person whose activities are illegal?

was not intended to illicit a fact but was purely rhetorical. Moreover, it was intended to mislead the jury as to the purpose of the government's evidence concerning the clock shop. It is not "a crime" to sell merchandise to a criminal, as Ms. Wolfson well knows, nor does the government contend that it is. Furthermore, if there were a question whether it is a crime to sell merchandise to a criminal, it would be a question of law to be decided by the court, not a question of fact to be answered by a lay witness. Ms. Wolfson was so advised by the court's ruling, "Well, I think that calls for a legal conclusion." Her rejoinder.

> Well, it is an FBI agent. It is a good person to ask.

was insolent and was knowingly specious. An FBI agent is not "a good person to ask" about questions of law during the trial of a criminal case, as Ms. Wolfson would be the first to point out should an FBI agent seek to testify on a point of law adversely to her client. The court's response, "The answer to which is no" is not entirely clear in cold print. But it could have left no doubt that the court was adhering to its ruling that the question was improper.

Notwithstanding this, Ms. Wolfson asked

> Do you know of any United States statute that you are sworn to enforce that makes it a crime --

whereupon the court interrupted with another ruling, "Sustained." Ms. Wolfson was standing at the lecturn near the bench and hear the court's ruling. Nonetheless, she pressed on

— for a commercial enterprise to sell to a crook?

Attorney Wolfson's unprofessional conduct on May 28, 1982, was intentional and willful. It was a repetition of the same kind of conduct about which the court had repeatedly admonished her. It is clear to the court that unless disciplinary action is taken against Ms. Wolfson, she will continue to defy the rulings of the court.

The court finds Attorney Jo-Anne F. Wolfson in criminal contempt and hereby imposes a fine in the penal sum of $300.00. The fine is to be paid to the Clerk of the Court by 3:00 p.m. on Friday, June 4, 1982. Ms. Wolfson is ordered to exhibit to the court a receipt from the Clerk no later than 4 p.m. on that date.

DATED: June 2, 1982 at 11:00 a.m.

ENTER: John F. Grady
United States District Judge